84-66

No.

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In the Supreme Court of the United States

October Term, 1984

WINE AND SPIRITS SPECIALTY, INC.,
A Missouri Corporation,
Appellant,

vs.

EDWARD D. DANIEL, Director, Department of Public Safety, JAMES A. FRANKLIN, JR., Supervisor, Division of Liquor Control,
Appellees,

and

MISSOURI WINE AND SPIRITS ASSOCIATION, INC.,
Appellee-Intervenor.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

I

Whether Missouri's liquor control laws, which require liquor wholesalers to post and distribute prices and, within specified bounds to adhere to them or risk penalty, and which was *stipulated* to be anti-competitive, conflict with the Sherman Act.

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MISSOURI WINE AND SPIRITS ASSOCIATION, INC.,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Circuit Court of Cole County, Missouri (App. A, *infra* A1) is not reported. The opinion of the Missouri Supreme Court (App. B, *infra* A4) is recorded in 666 S.W.2d 416 (Mo. 1984). The Missouri Supreme Court's denial of a Motion for Rehearing (App. C, *infra* A21) is not reported.

JURISDICTION

The Missouri Supreme Court reversed a lower court decision stating that Missouri price posting laws authorized or compelled conduct that constitute a violation of the Sherman Act, 15 U.S.C. § 1, et seq. (*infra*), a valid federal regulation.

The notice of appeal (App. D, *infra* A22) was filed with the Missouri Supreme Court on June 18, 1984. The Missouri Supreme Court's denial of the Motion for Rehearing without comment was entered on April 16, 1984.

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257(2).

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. § 1 et seq. (1976), Revised Statutes of the State of Missouri (R.S.Mo. 1978) § 311.332, 311.334, 311.336, and 311.338 (App. E, *infra* A24); and Regulation Number 70-2.190 State of Missouri, Division of Liquor Control (App. F, *infra* A27), promulgated pursuant thereto.

Title 15, United States Code, § 1, et seq. (1976), Sherman Act, provides "Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." U.S. Constitution, Twenty-first Amendment, § 2, provides "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquor, in violation of the laws thereof, is hereby prohibited."

STATEMENT

Triggered in large part by this Court's decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), State regulation of the alcoholic beverage industry has faced, for the first time, intense scrutiny under the anti-trust laws. State regulations that prohibit or inhibit competition continue to clash with the policy of competition that forms the core of the Sherman Act. Four years of *post-Midcal* litigation, in state and federal courts, have produced little more than confusion, as conflicting decisions continue to be announced.

The parties involved in the lower court decision in Missouri *stipulated* that the Missouri price posting regulations are anti-competitive—that they stabilize prices and restrain price competition. Under this Court's decision in *Rice v. Norman Williams*, 458 U.S. 654 (1982), these stipulated facts should have left for resolution only the questions of whether the "State Action" doctrine or the Twenty-First Amendment shielded Missouri's anti-competitive regulations from anti-trust scrutiny. The Court below, however, ignored the stipulated facts and held instead that Missouri's price posting laws did not conflict with the Sherman Act. In doing so, it simultaneously placed itself in direct conflict with some federal and state courts and in harmony with others.

Virtually every state and the federal government have regulated the alcoholic beverage industry. Reconciling such regulations with the Sherman Act—a task of undoubted and national significance—has spawned conflicting state and federal court decisions. Intervention by this Court is thus desirable and necessary in order to resolve these conflicts.

The State of Missouri has enacted laws relating to the sale, use, possession, distribution, and taxing of alcoholic beverages in that state. The laws, in the State of Missouri, are referred to as the "Liquor Control Law" and are found in Chapter 311 of the Revised Statutes of the State of Missouri.

The Missouri liquor control law includes a "post and hold" statute. Under the post and hold statute, a wholesaler of liquor products is required to file a monthly schedule of prices which that wholesaler intends to charge for a brand or item during the following month. This pricing information is then provided to all other wholesalers throughout the state. The other wholesalers may, within three days, amend their price list to meet, but not go lower than, those prices to be met. Should a given wholesaler post a price which is more than 2% lower than his previously posted schedule, that price must be "held for six months absent special dispensation from the Liquor Control Division."

If a wholesaler fails to post his prices or violates the provisions of the so-called "price posting laws," in any way, he is subject to a misdemeanor conviction and a mandatory license suspension for not less than fifteen days, or to discretionary revocation of his license.

Appellant, Wine and Spirits Specialty, Inc., challenged the Missouri price posting laws because it felt that those statutes produced an anti-competitive effect which revealed itself in the form of higher prices for liquor products, stabilized and reduced competition among wholesalers, all to the detriment of the Appellant who is a Missouri liquor wholesaler who wanted to deal in a free and competitive marketplace. Named as defendants were the Director of the Department of Public Safety, and the

Supervisor of the Division of Liquor Control for the State of Missouri, Appellees herein. The Circuit Court of Cole County heard the case on a stipulation of facts filed jointly by all parties to the action. Among the facts stipulated to were that "the price posting regulations may have the effect of restraining price competition and stabilizing prices in the marketplace; that the price posting law and regulations may have the effect of inhibiting competition; that due to the stringent nature and penalties imposed for violations, very few wholesalers sell below the posted price."

The lower court found that the Missouri scheme conflicted with the Sherman Act. It also determined that under the circumstances, there was no state immunity under the State Action doctrine or the Twenty-First Amendment to the United States Constitution. Since this action involved a construction of a state statute, direct appeal was taken to the Supreme Court of the State of Missouri which rendered an opinion (App. B, *infra* A4), reversing the decision of the trial court, and upholding in their entirety the Missouri price posting laws. As a result of its holding that the price posting laws did not conflict with the Sherman Act, the Missouri Supreme Court did not address the trial court's holding that the Missouri price posting laws were not immune under the State Action doctrine or the Twenty-First Amendment. A dissenting opinion (App. B, *infra* A10), would have sustained the trial court's result, reasoning that the price posting laws of Missouri are invalid under the Sherman Act by virtue of their inevitable effect on competition.

A timely motion for rehearing was filed by Appellant on April 3, 1984. That motion was denied without comment, on April 16, 1984.

THE QUESTION IS SUBSTANTIAL

Since this Court's decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), challenges to the price posting laws in the liquor industry, have been raised in at least seven jurisdictions including, but not necessarily limited to, the following states: New York, Minnesota, Kentucky, Oregon, Nebraska,[1] Connecticut, and Missouri. Because *Midcal* dealt with fair trade contracts rather than state "post and hold" schemes, as do these more recent cases, *Midcal's* application in analyzing these schemes has at times produced directly inconsistent results among these jurisdictions.

That the issue of the relationship between price posting legislation and the Sherman Act is fraught with confusion is illustrated not only by the fact that numerous jurisdictions have addressed this question in an inconsistent fashion, but also by the dissent by the Honorable Justice Charles Blackmar of the Missouri Supreme Court in this case (App. B, *infra* A10). Justice Blackmar observes that even though the lower court in the State of Missouri may have mistakenly categorized the Missouri price posting scheme as one involving "resale price maintenance," the trial court was correct in concluding that the restraint on competition effectuated under the Missouri scheme—however it may be characterized—ran afoul of the Sherman Act. The majority opinion in Missouri relied on the decision reached by this Court in *Rice v. Norman Williams*, 458 U.S. 654 (1982). As Justice Blackmar observed, however, the

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1. A recent decision by the Nebraska Supreme Court (App. G, *infra* A38) has not been recorded (see *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*,—No. 83-255 filed June 1, 1984), appears to directly conflict with the decision reached in the Missouri case.

Norman Williams case involved a far different situation than that one encountered when construing the Missouri price posting laws. *Norman Williams* involved a challenge to that provision of the California Alcoholic Beverage Control Act, which prohibited licensed importers from purchasing or receiving any brand of distilled spirits (unless "he is designated as an authorized importer of such brand by the brand owner or his authorized agent"). The purpose of that statute was to prevent California importers from going to the State of Oklahoma and purchasing distilled spirits there that they could not purchase through the California distribution system. In *Norman Williams,* the statute in question was attacked prior to its enactment date, and it was alleged by the attackers to be *"per se* illegal on its face." This Court, relying on its decision in *Continental TV, Inc. v. GTE Sylvania, Inc.,* 443 U.S. 36 (1977), simply stated that the statute should not be struck down in the abstract, but rather should be scrutinized under the so-called "rule of reason." As Justice Blackmar stated, on the other hand, "The anti-competitive effect of the Missouri statute is manifest. A case dealing with restraints subject to the rule of reason is not authoritative in its application to per se restraints." (See Dissenting Opinion, App. B, *infra* A18). The majority in this case found that the Missouri price posting laws "neither authorized nor sanctioned individual wholesalers to contract, combine, or conspire to fix the prices that they or any other wholesaler or retailer charge. Rather, the price posting laws mandate unilateral action on the part of every wholesaler in order to 'preclude a licensee in one phase of . . . liquor traffic from controlling other phases . . .'." (See Majority Opinion, App. B, *infra* A8). Applying the reasoning on *Midcal,* Justice Blackmar recognized the important issue. "The wholesalers do not *need* an agreement. The statutory plan must fail because it is

subversive of the purpose of the Sherman Act. Were this not so, the entire program of the federal anti-trust laws would be rendered nugatory by state legislation which allows competitors to uphold prices without the necessity for an agreement. State legislation, which is inconsistent with the established purpose of valid federal regulation cannot survive." (Dissenting Opinion, App. B, *infra* A18) (Emphasis added).

Price fixing is inimical to the competitive system and should not be condoned absent substantial state interest. (See *Midcal, supra*). The various state court decisions previously referred to have created confusion and uncertainty in the alcoholic beverage industry in those states where statutes can require conduct on the part of liquor wholesalers which can be violative of the Sherman Act and, therefore, subject them to possible civil and criminal penalties whether they comply with the statutes in question or refuse to do so. Action by this Court is necessary to provide for uniform application of the Sherman Act in those states possessing price posting schemes.[2]

Respectfully submitted,

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2. That the need for clarification by this Court is so paramount can best be illustrated by reviewing two additional opinions reached subsequent to the decision of this Court in *Midcal*.

(Continued on following page)

Footnote continued—

The first case was *Lewis-Westco and Company v. Alcoholic Beverage Control Appeals Board*, 186 Cal. Rptr. 552 (Cal. App. 1982). This case was a California Court of Appeals case dealing with the price posting provisions in all respects identical to the Missouri price posting provisions. There, the wholesalers were required to file written price schedules showing prices and discounts including quantity discounts. There, the statute provided that a wholesaler could lower prices in order to meet competitive brands, but could not reduce the net price of a particular brand to a price lower than that of a competing brand (like Missouri). The respondents in that case argued that *Midcal* was distinguishable since *Midcal* involved vertical and horizontal "price fixing" as distinguished from price posting. The court, in striking down the scheme, stated:

> "It is well established that price fixing alone is illegal per se because it eliminates one form of competition . . . . it is equally settled that 'any combination which tampers with the price structure is unlawful. Although the participants of a price posting scheme may be in no position to control the market, to the extent that they raise, lower, or *stabilize* prices, they violate the act, and this is so even if the prices fixed are reasonable.' " (Emphasis added) (*Id.* at 834).

The opposite conclusion was reached in the case of *Enrico, Inc. v. Rice*, 551 F.Supp. 511 (D.C. Cal. 1982). Although the initial decision was decided on cross-motions for summary judgment, and was decided when the effects of the statute in question had not been demonstrated, it did involve a review by the district court of an anti-trust challenge to California's liquor price posting laws. In upholding the validity of the California price posting law against this challenge, the district court ruled that California's price posting law:

> "Mandates only unilateral action by each wholesaler, independent activity insufficient to constitute a Sherman Act (§ 1 Violations)." (*Id.* at 515).

The Court in *Enrico* did, however, recognize the importance of the issue involved when it stated:

> "The question of whether Rule 100 is *facially* invalid due to conflict with § 1 of the Sherman Act, raises, in the opinion of this Court, important anti-trust issues . . . ." (Emphasis added) (*Id.* at 515).

(Parenthetically, it should be noted that the price posting laws have been abolished in California.)

APPENDIX

APPENDIX A

(Dated March 23, 1983)

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI

No. CV180-214CC

WINE AND SPIRITS SPECIALTY, INC., 3150 Mercier,
Kansas City, Missouri,
Plaintiff,

vs.

E. D. DANIEL, Director, Department of Public Safety,
621 East Capitol Ave., Jefferson City, Missouri 65101,

and

JAMES A. FRANKLIN, JR., Supervisor, Division of Liquor
Control, 505 Missouri Boulevard,
Jefferson City, Missouri 65101,
Defendants,

and

MISSOURI WINE & SPIRITS ASSOCIATION, INC.,
235 East High, Suite 203, Jefferson City, Missouri, 65101,
Intervenor-Defendant.

ORDER AND CONCLUSIONS OF LAW

This case has been tried on a stipulation of facts filed by the parties on July 22, 1982, a copy of which is attached hereto and made a part hereof. The parties have submitted briefs in support of their position. The Court

having considered the stipulation of facts and the arguments of Counsel, make the following conclusions of law:

1. That the Missouri price posting laws, specifically Section 311.332, 311.334, 311.336, and 311.338, and the rules and regulations issued in aid thereof, constitute resale price maintenance, price fixing, and restrain trade in violation of The Sherman Act, 15 U.S.C. Section 1, et seq. Said statutory plan is illegal *per se*.

2. That the Missouri price posting laws as aforementioned authorize or compel conduct that constitute (sic) a violation of The Sherman Act, 15 U.S.C. Section 1, et seq.

3. That Missouri price posting laws, as aforementioned, place irresistable (sic) pressure on private parties to violate The Sherman Act, 15 U.S.C. Section 1, et seq.

4. That the defendants involvement in the foregoing statutory price maintenance program is insufficient to afford that scheme immunity from liability under the so-called "State Action" doctrine of *Parker v. Brown*, 317 U.S. 341.

5. That the 21st Amendment to the Constitution of the United States does not bar application of the Sherman Act to the Missouri Liquor and Wine pricing system.

6. Plaintiff is entitled to the following Judgment Entry.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered as follows:

1. Missouri Statutes, Section 311.332, 311.334, 311.336, and 311.338, and the rules and regulations issued pursuant thereto, constitute resale price maintenance and price

fixing, in violation of the Sherman Act, 15 U.S.C. Section 1 et seq., and are null and void in all things.

2. The defendants are hereby permanently enjoined and restrained from enforcing said statutes and the regulations issued pursuant thereto, in whole or in part, against Plaintiff or any other Missouri wholesale liquor or wine distributors.

/s/ Byron L. Kinder
Byron L. Kinder
Circuit Judge, Division II

Dated this 23rd day of March, 1983.

APPENDIX B

WINE AND SPIRITS SPECIALTY, INC.,
Plaintiff-Respondent,

v.

Edward D. DANIEL, Director, Department of Public Safety,

James A. Franklin, Jr., Supervisor, Division of Liquor Control, Defendants-Appellants,

Missouri Wine and Spirits Association, Inc.,
Intervenor-Defendant-Appellant.

No. 64984.

Supreme Court of Missouri,
En Banc.

March 20, 1984.

Rehearing Denied April 16, 1984.

Appeal was taken from a declaratory judgment of the Circuit Court, Cole County, Byron L. Kinder, J., that the liquor price-posting laws, and analogous regulation of the Department of Liquor Control, violate the Sherman Act. The Supreme Court, Donnelly, J., held that price-posting laws neither authorized nor sanctioned individual wholesalers to contract, combine or conspire to fix prices that they or any other wholesalers or retailers charge, notwithstanding contention that the laws induce a tacit agreement among wholesalers to stabilize prices, and thus Supreme Court could not constitutionally condemn the laws as mandating conduct that constituted a violation of antitrust laws

in all cases or as placing irresistible pressure on private parties to violate the antitrust laws.

Reversed.

Blackmar, J., dissented with opinion.

* * *

John Ashcroft, Atty. Gen., Robert E. Dolan, Jr., Warren Weinstein, Asst. Attys. Gen., Jefferson City, for defendants-appellants.

Alex Bartlett, Jefferson City, William B. Schreiber, Michael T. Kelly, New York City, William P. Wright, Jefferson City, for intervenor-defendant-appellant.

Richard E. McFadin, F.A. White, Jr., North Kansas City, Mo., for plaintiff-respondent.

DONNELLY, Judge.

This is an appeal from a declaratory judgment that §§ 311.332, 311.334, 311.336 and 311.338, RSMo 1978, more commonly known as price posting laws, and the analogous regulation of the Department of Liquor Control, 11 C.S.R. 70-2.190, violate the Sherman Act, 15 U.S.C. § 1 et seq. (1976). This Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

The facts are stipulated. The General Assembly has enacted liquor control laws to regulate various phases of the liquor industry. Under these laws manufacturers, wholesalers and retailers are characterized as separate "phases" of liquor traffic requiring separate licenses. Appellants, Director of the Department of Public Safety and Supervisor of the Department of Liquor Control (hereinafter Supervisor), enforce and administer these liquor control laws. The parties acknowledge that while these

laws "may at times have the effect of inhibiting price competition, [they] do not compel or authorize wholesalers to agree among themselves for the purpose of contracting, combining or conspiring to fix * * prices."

At trial, respondent, a duly licensed wholesale distributor, sought to enjoin the enforcement of Missouri's price posting laws. Section 311.332 makes it unlawful for any wholesaler to discriminate between retailers or to grant, directly or indirectly, any discount, rebate or free goods except a quantity and payment discount not in excess of one percent apiece. Sections 311.334 and 311.336 require each wholesaler to file monthly a schedule of the prices it intends to charge and the discounts it intends to grant to its retail customers during the upcoming month. The Supervisor then aggregates this information and makes it available for inspection by all wholesalers. Within three days thereafter each wholesaler may reduce (but *not* increase) its prices to meet (but not to go below) lower competing prices and discounts. Section 311.336 additionally empowers the Supervisor to "make such rules and regulations as shall be appropriate to carry out [these laws]." Pursuant thereto the Supervisor promulgated 11 C.S.R. 70-2.190 to effectuate these provisions. Section 311.338 provides that if a wholesaler violates any of the aforementioned provisions, its license will be either suspended for not less than fifteen days or revoked.

The trial court found these laws: (1) are *per se* illegal as constituting resale price maintenance, price fixing and a restraint of trade, (2) authorize or compel conduct violative of the Sherman Act, and (3) place irresistible pressure on private parties to violate the Sherman Act. We disagree.

The Sherman Act makes illegal:

> Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations * * *.

15 U.S.C. § 1 (1976). In *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982), the Supreme Court articulated the test to be used on this appeal:

> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. * * *
>
> [A] state statute, when considered in the abstract may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. *Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.* If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. (Emphasis supplied.)

Id. 458 U.S. at 659, 661, 102 S.Ct. at 3299, 3300. Thus, the essential question is whether Missouri's price posting laws constitute a *per se* violation in all cases.

Relying on *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), respondent asserts that Missouri's price posting laws constitute resale price maintenance, a *per se* violation of the Sherman Act. *Rice*, 458 U.S. at 659-60, 102 S.Ct. at 3299-3300. Although the Supreme Court held in *Midcal* that California's price posting laws constituted resale price maintenance, those provisions are dissimilar to the provisions challenged here. California's liquor control laws required producers and wholesalers to enter into fair trade contracts whereby the producer established not only the price it charged the wholesaler but also the price the wholesaler charged retailers. If they failed to enter into such an agreement the wholesaler was subsequently required to post a price schedule which bound all other wholesalers in the area. *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 153 Cal.Rptr. 757 (1979), aff'd sub nom. *Midcal, supra*. California's price posting scheme was "not one which merely require[d] each distributor to specify prices, [but rather was] for the purpose of fixing prices." *Id.* 153 Cal.Rptr. at 761. The Supreme Court had no difficulty in determining that California's wine pricing system facially conflicted with the Sherman Act because it mandated resale price maintenance. *Midcal*, 445 U.S. at 103, 100 S.Ct. at 942; *Rice*, 458 U.S. at 659, 102 S.Ct. at 3299.

As summarized above, Missouri's price posting laws are distinguishable. Initially, each wholesaler determines individually the price it will charge retailers. While the wholesalers are afforded an opportunity to change their prices they are not so required; any change must be based on their independent judgment. The price posting laws neither authorize nor sanction individual wholesalers to contract, combine or conspire to fix the

prices that they or any other wholesaler or retailer charge. Rather, the price posting laws mandate unilateral action on the part of every wholesaler in order "to preclude a licensee in one phase of * * * liquor traffic from controlling other * * * phases * * *." *Brown-Forman Distillers Corp. v. Stewart,* 520 S.W.2d 1, 7 (Mo. banc 1975). The mere fact that the state makes the wholesalers' initial prices available for public display does not itself constitute a *per se* violation of the Sherman Act. *United States v. Citizens & Southern National Bank,* 422 U.S. 86, 113, 95 S.Ct. 2099, 2155, 45 L.Ed.2d 41 (1975); *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45, 86 S.Ct. 1254, 1260, 16 L.Ed.2d 336 (1966). Thus, while California's price posting laws were *per se* illegal as constituting resale price maintenance, Missouri's clearly are not. *See Enrico's Inc. v. Rice,* 551 F.Supp. 511 (N.D. Cal.1982); *United States Brewers Assoc., Inc. v. Healy,* 532 F.Supp. 1312 (D.Conn.1982) [rev'd on other grounds, 692 F.2d 275 (2nd Cir.1982)]; *Serlin Wine and Spirit Merchants, Inc. v. Healy,* 512 F.Supp. 936 (D.Conn.1981), aff'd sub nom. *Morgan v. Division of Liquor Control,* 664 F.2d 353 (2nd Cir.1981); *Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority,* Trade Cas. (CCH) ¶ 64,964 (S.D.N.Y.1982), *Louis Finocchiaro, Inc. v. State of Nebraska and Nebraska Liquor Control Commission,* No. 336 (D.C., Lancaster Co., Neb.1983); *Martignetti Grocery Co. v. Alcoholic Beverages Control Commission,* No. 81-1305 (Mass. Superior Ct., Middlesex Co. 1983).

The parties stipulated that the price posting laws do not authorize or compel wholesalers to agree among themselves for the purpose of contracting, combining or conspiring to fix prices. Nevertheless, respondent ostensibly argues that the price posting laws induce a tacit agree-

ment among wholesalers to stabilize prices. In this as in other areas of coincident federal and state regulation, we will not seek out a conflict where none exists. *Seagram & Sons,* 384 U.S. at 45, 86 S.Ct. at 1260. Talismanic invocation of the words "price fixing" and "restraint of trade" do not justify automatic application of the fatal *per se* rule. To characterize these price posting provisions as *per se* "price fixing" or "restraint of trade" is to ignore that their purpose is to defeat such pernicious consequences. *Brown-Forman, supra.* For the same reasons articulated above, we find no *per se* violation due to price fixing or restraint of trade; therefore, we cannot constitutionally condemn Missouri's price posting laws as mandating conduct that constitutes a violation in all cases or that places irresistible pressure on private parties to violate the antitrust laws. *Rice,* 458 U.S. at 661, 102 S.Ct. at 3300.

Because of our resolution of the preemption issue, we need not consider whether the price posting laws would be saved under the state action doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or under the Twenty-First Amendment. *Id.* 458 U.S. at 662 n. 9, 102 S.Ct. at 3301 n. 9.

We decline on the record preserved on this appeal to rule the issue of whether Missouri's price posting laws are invalid under the "rule of reason." *Rice, supra.* The judgment of the trial court is reversed.

RENDLIN, C.J., and WELLIVER, HIGGINS, GUNN and BILLINGS, JJ., concur.

BLACKMAR, J., dissents in separate opinion filed.

BLACKMAR, Judge, dissenting.

The principal opinion suggests that the purpose of Missouri's liquor price posting laws is to defeat the "per-

nicious consequences" of price fixing and restraint of trade. I simply cannot discern this purpose in the legislation, but rather conclude that the necessary effect, and therefore the intent, of the Missouri statute and accompanying regulations is to mandate a scheme for the fixing of prices subversive of the purpose of the Sherman Act, 15 U.S.C. § 1.

I agree with the principal opinion in holding that the trial court was incorrect in finding that the governing statute and regulations effectuate "resale price maintenance." Resale price maintenance, a vertical restraint, involves efforts by manufacturers or wholesalers to set the prices below which retailers may not subsequently resell their products. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). Missouri's liquor price posting laws neither involve nor condone efforts in setting minimum retail prices, as did the statutes held invalid in *Midcal*. The issue is foreign to the case, and its injection by respondent, and countenancing by the trial court, only sows confusion.

The principal opinion, however, after properly noting the absence of any provision which could possibly be considered as effecting resale price maintenance, does not set forth an adequate analysis as to what our statute, as implemented by regulation, actually does.

Section 311.334, RSMo 1978 requires each wholesaler to file monthly a schedule of the prices it intends to charge and the discounts it intends to grant to its retail customers during the ensuing month. Section 311.336, RSMo 1978 specifically requires that

> Each such schedule shall be filed on or before the tenth day of each month, and the prices and discounts

> therein set forth shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for and during such calendar month. . . . No brand of liquor or wine shall be sold or purchased for a retailer by a wholesaler or by a retailer through a wholesaler except at the price or prices then in effect according to the wholesaler's filed schedule, and no discount shall be granted except as set forth in the schedule then in effect.

Ten days after wholesalers file their price schedules, the individual price schedules are made available for inspection by all other wholesalers. § 311.336. A wholesaler is then given the opportunity, within three days after the schedules are made available for inspection, to file amendments to its price schedule. All interim price amendments must be downward. No upward price changes are permitted during the amendment period. But a price change may not go below the lowest price posted by a competitor. § 311.336; 11 C.S.R. 70-2.190(2)(C)1. and 2.

The above requirements of posting liquor wholesale prices for the upcoming month are not the only controls placed upon liquor wholesalers in Missouri. Section 311.332, RSMo 1978, states in pertinent part that

> It shall be unlawful for any wholesaler licensed to sell intoxicating liquor and wine . . . to discriminate between retailers or in favor of or against any retailer or group of retailers, directly or indirectly, in price, in discounts for time of payment, or in discounts on quantity of merchandise sold, or to grant directly or indirectly, any discount, rebate, free goods, allowance or other inducement, *excepting a discount not in excess of one percent for quantity of liquor and wine, and a discount not in excess of one percent for payment on or before a certain date.*

(emphasis supplied). Section 311.336 empowers the Supervisor of the Department of Liquor Control to "make such rules and regulations as shall be appropriate to carry out [these laws]." The Supervisor has promulgated 11 C.S.R. 70-2.190, purportedly to effectuate the above-mentioned preventions.

These regulations add increasing restrictions upon the liquor wholesaler's ability to compete in an open market economy. The regulations provide that if a wholesaler decreases a posted price by more than two percent of the prior month's posted price, that wholesaler's price stands to be frozen at the lower level for six months.[1] Specifically, § 70-2.190(2)(E)1. states that

> It shall be presumed (subject to rebuttal as hereinafter set forth) that any price scheduled by any licensed wholesaler which is less than ninety-eight per cent (98%) of the price scheduled by the same licensed wholesaler for the same brand . . . on the price schedule of said licensed wholesaler for the prior month represents an attempt by such wholesaler to give an indirect quantity discount in excess of one per cent (1%).

This is said to be a "rebuttable" presumption that can be overcome by reasonable proof to the supervisor of liquor control that the scheduled price is a fair wholesale market price for the merchandise, rather than an indirect quantity discount in excess of one per cent.

Particularly noteworthy is the regulation which governs the introduction by a wholesaler of a new brand, which it has not previously handled but which has been sold in Missouri by other wholesalers. The regulation is described in the stipulation of facts on which the case was tried in the following language:

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1. C.S.R. 70-2.190(2)(E)1.

> A new product may be added by any wholesaler to its price filing at any time during any month, provided that the brand is registered with and approved by the Supervisor and a supplemental price schedule is filed with the Supervisor. If the brand being added has never previously been sold in the State by any wholesale licensee, the wholesaler intending to sell it may schedule it at any price it desires. *If a wholesaler wishes to add a brand, or size of a brand, that has been previously sold by another wholesaler, the brand may not be scheduled at a price lower than the price currently filed by other wholesalers during the first month such brand is sold by the wholesaler adding same* [11 CSR 70-2.190(2)(A)]. (Emphasis supplied).

These provisions inject a degree of rigidity into the price structure of wholesalers which surely would be illegal, if it came about as the result of agreement among private parties.[2] It may be objected that a state-imposed regulation is not necessarily invalid simply because an agreement among private parties would be, citing *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), but the force of that case is seriously weakened by *Midcal*, *supra*, and the erosion of the Sherman Act is the same

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2. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). *See, Sugar Institute, Inc. v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936) (group of competitors meeting and collectively agreeing to exchange price information for the purpose of maintaining a uniform price structure constituted price fixing); *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969) (agreement among competitors to exchange price information which had the effect of stabilizing prices was illegal).

whether the state legislation expressly sanctions illegal agreements or makes express agreements unnecessary.

Once a wholesaler posts a price, the price is frozen for 30 days. The only exception comes about if another wholesaler posts a lower price, in which event others may meet, but not go below, that posted price. A very substantial damper is imposed on any price reduction of more than 2%. The wholesaler who posts a reduction of this kind stands to be frozen at the lower price for six months, unless the bureaucracy can be persuaded to grant an indulgence. Small wonder, then, that wholesale prices are hardly ever reduced substantially.[3]

The price fixing aspects of the law are especially vicious when a new brand is introduced between postings. The wholesaler doing so is not free to set the initial price, if any other wholesaler has a posted price for the brand, but must post a price which is not lower than the lowest posted price of any other wholesaler. The newly introducing wholesaler, furthermore, may not set a lower price at the next posting without facing the possibility of a six month freeze, as described above.

The whole Missouri program has the predictable effect of inhibiting price reductions and introducing rigidity into the whole price structure. Wholesalers are not free to compete by changing prices dictated by their economic judgment. We must decide whether a scheme having this inevitable and predictable effect is consistent with the policy of the Sherman Act.

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3. The parties have stipulated that the Missouri price posting laws may have the effect of restraining price competition and stabilizing prices. In addition, appellant states in its brief that on two occasions, "in December, 1981, and January, 1982," wholesale petitions for relief from the six month price freeze were successful.

In evaluating the anticompetitive effect of Missouri's liquor price posting laws and regulations, the principal opinion places strong and unjustified reliance on the United States Supreme Court's decision in *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). *Norman Williams* involved a "vertical non-price restraint" which is not a per se violation, but rather is analyzed under the rule of reason to determine Sherman Act illegality. *See Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

The antitrust challenge in *Norman Williams* was to a provision of California's alcoholic beverage laws which stated that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

> The statute apparently was enacted in response to the perceived extraterritorial effects of Oklahoma's "open wholesaling" statutes, whereby a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers.

The respondent-importers challenged enforcement of California's designation statute prior to the date it was to go into effect as per se illegal on its face.

Relying on its decision in *GTE Sylvania*, the Court held that a manufacturer's use of vertical non-price restraints is not per se illegal, but rather is subject to the "rule of reason", explaining its conclusion as follows:

> Because restraints on intraband (sic) competition may promote interbrand competition, we concluded that

> nonprice vertical restraints should be scrutinized under the rule of reason. . . . After our decision in *GTE Sylvania*, it cannot be said that every attempt by a manufacturer to restrain competition in its own products is illegal under the Sherman Act.
>
> California's designation statute merely enforces the distiller's decision to restrain intraband (sic) competition. It permits the distiller to designate which wholesalers may import the distiller's products into the State. . . . The designation statute does not *require* the distiller to impose vertical restraints of any kind; that is a matter for it to determine. The *number* of importers which may be designated by the distiller is not limited; the designated importer is not required to sell the imported brand to retailers within a specified area or from a specified location within the State.

Id. 458 U.S. at 661-62, 102 S.Ct. at 3300-01 (citations omitted). The Court further indicated that for purposes of determining whether the distiller's ability to restrict intrabrand competition was per se illegal it was irrelevant that the activity had the "imprimatur of a state statute."[4] *Id.* 458 U.S. at 662, 102 S.Ct. at 3300-01, *citing New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-11, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978) for the proposition that the "designation statute might have an anticompetitive effect when applied in concrete factual

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4. The effect of the statute was "simply to counteract the perceived extraterritorial effects of Oklahoma's alcoholic beverage laws, which, as once understood, operated to deprive the distiller of control over its distribution system nationwide. Thus, California's designation statute merely restored what Oklahoma had taken away: the distiller's ability to determine which wholesalers may import its products into California." *Norman Williams, supra*, 458 U.S. at 662, 102 S.Ct. at 3300-01.

situations." *Norman Williams, supra,* 458 U.S. at 662 n. 7, 102 S.Ct. at 3300 n. 7. The anticompetitive effect of the Missouri statute is manifest. A case dealing with restraints subject to the rule of reason is not authoritative in its application to per se restraints.

The principal opinion, in relying on *Norman Williams,* gives far too little attention to *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). That case is highly applicable to the present case because price fixing, like resale price maintenance, is a per se violation of the Sherman Act.[5] Price fixing, as a matter of fact, is the prime restraint of trade against which the Sherman Act is directed. *Midcal* is important because it holds that a state statute must fall if it sanctions per se Sherman Act violations.

It is not a sufficient answer to say, as the principal opinion does, that

> The price posting laws neither authorize nor sanction individual wholesalers to contract, combine or conspire to fix the prices that they or any other wholesaler or retailer charge. . . .

The wholesalers do not need an agreement. The statute and regulations effectively allow them to place a floor under prices, just as fully as though the wholesalers had

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5. Under the antitrust laws, numerous practices have been held to be illegal per se without regard to their precise purpose or harm. In addition to price fixing, these practices include resale price maintenance, *United States v. Parke, Davis & Co.,* 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); horizontal division of markets, *United States v. Addyston Pipe & Steel Co.,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); group boycotts, *Fashion Originators' Guild v. F.T.C.,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); and tying arrangements, *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947).

reached an agreement. The statutory plan must fail because it is subversive of the purpose of the Sherman Act. Were this not so, the entire program of the federal antitrust laws could be rendered nugatory by state legislation which allows competitors to uphold prices without the necessity for an agreement. State legislation which is inconsistent with the established purpose of valid federal regulation cannot survive.

Appellant Director maintains that the validity of the price posting laws is demonstrated by the state legislature's purpose in their enactment, stating in his brief as follows:

> The Missouri price posting laws were enacted by the Missouri General Assembly to prohibit price discrimination by wholesalers in their sales to retailers. The price posting laws have accomplished this purpose by requiring wholesalers to file their prices and discounts with the state and further requiring wholesalers to adhere to their posted prices and discounts in their sales to retailers.

I agree with the holding in the principal opinion that the mere requirement of posting of wholesale prices does not contravene the letter or the policy of the Sherman Act. Nor do I question at this point the provisions of the Missouri statute which limit the discounts which may be granted for quantity purchases and prompt payment. It is not improper for a state to require that a wholesaler make the same, or substantially the same price available to all retailers he chooses to deal with.

Missouri's liquor price posting laws, however, do not merely require the posting of prices. The statutes and regulations go beyond this and drastically restrict a wholesaler's ability to change prices that would be available to *all* retailers. The effect of 11 C.S.R. 70-2.190(2)(E)1. is

the imposition of a very restrictive time restraint (six month freeze) on a wholesaler who wishes to lower his prices more than 2% below his prior monthly price schedule. The suggestion in the regulations that a reduction of more than 2% creates a rebuttable "presumption" of a purpose of granting an impermissible quantity discount seems palpably absurd, if the posted price must be made available to all. The real purpose of the regulations—that of inhibiting vigorous price competition—becomes readily apparent.

In the view I take of the case, I must deal with the appellants' attempt to justify the challenged statute and regulations (1) under the Twenty-First Amendment and (2) under the "state action" doctrine of *Parker v. Brown, supra. Midcal* answers both points. The present case involves the sale of alcoholic beverages in Missouri rather than importation contrary to the laws of Missouri, and is not within the state's extended sphere of control as defined in the Twenty-First Amendment. There is nothing remotely resembling the expansive regulation of the marketing of raisins, a local crop, which was involved in *Parker v. Brown, supra.* The wholesalers, not the state, establish the prices. The vice in the Missouri scheme is that it introduces unwarranted inhibitions into their ability to lower prices.

I cannot avoid the conclusion that the Missouri statute and regulations are at war with the Sherman Act and that the judgment that they are facially invalid is correct in spite of the erroneous conclusion as to resale price maintenance. Remand is probably required because of that erroneous conclusion, but the remand should be for a determination of the portions of the statute and regulations which must be held invalid under the principles here expressed.

APPENDIX C

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri 65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

April 16, 1984

Mr. Richard E. McFadin
Mr. F. A. White, Jr.
1920 Swift, Suite 205
North Kansas City, MO 64116

Mr. Michael Madsen
PO Box 235
Jefferson City, MO 65102

In re: Wine and Spirits Specialty, Inc., vs. Edward D. Daniel, et al., Missouri Wine & Spirits Assn, Inc. int. No. 64984

Gentlemen:

This is to advise that the Court this day entered the following order in the above-entitled cause:

Resp.'s motion for rehearing overruled.

Very truly yours,

/s/ Thomas Simon
Clerk

cc: Attorney General (Wieler)
William B. Schreiber-Michael T. Kelly
William P. Wright
Sherwin L. Epstein-Brian T. Meyers
Alex Bartlett-Roger Toppins

APPENDIX D

(Filed June 18, 1984)

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

No. 64984

WINE AND SPIRITS SPECIALTY, INC.,
A Missouri Corporation,
Appellant.

vs.

EDWARD D. DANIEL, DIRECTOR, Department of Public Safety, JAMES A. FRANKLIN, JR., Supervisor, Division of Liquor Control,
Appellee,

and

MISSOURI WINE AND SPIRITS ASSOCIATION, INC.,
Intervenors-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wine and Spirits Specialty, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Missouri Supreme Court reversing a decision of the Circuit Court of Cole County, Missouri, in this action on April 16, 1984, number 64984.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

McFadin and White
By /s/ Richard E. McFadin
Richard E. McFadin #15879
By /s/ F. A. White, Jr.
F. A. White, Jr. #22565
1920 Swift
Suite 205
North Kansas City, Missouri 64116
(816) 471-3966
Attorneys for Wine and Spirits Specialty, Inc., Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing Notice of Appeal was sent by United States mail, postage prepaid to: Alex Bartlett, Bartlett, Venters, Pletz and Toppings, 325 Jefferson Street, P.O. Box 1586, Jefferson City, Missouri 65102, Attorneys for Missouri Wine and Spirits Association, Inc., Intervenors-Appellees; Robert E. Dolan, Jr., Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; Schreiber, Tunick and MacKnight, 375 Park Avenue, New York, New York 10152; and to Sherwin L. Epstein, 1006 Grand Avenue, Suite 1132, Kansas City, Missouri 64106, on this ..... day of June, 1984.

/s/ Richard E. McFadin
Attorney for Appellant

APPENDIX E

Section 311.332. Wholesale price regulation - discrimination prohibited.

It shall be unlawful for any wholesaler licensed to sell intoxicating liquor and wine containing alcohol in excess of 5% by weight to persons duly licensed to sell such intoxicating liquor and wine at retail, to discriminate between retailers or in favor of or against any retailer or group of retailers, directly or indirectly, in price, and discounts for time of payment, or in discounts on quantity of merchandise sold, or to grant directly or indirectly, any discount, rebate, free goods, allowance, or other inducement, excepting a discount not in excess of 1% for quantity of liquor and wine, and a discount not in excess of 1% for payment on or before a certain date.

Section 311.334. Wholesaler to file scheduled prices, contents.

No intoxicating liquor and wine of any kind shall be sold by a wholesaler to a retailer duly licensed to sell intoxicating liquor and wine at retail, or purchased by wholesaler for a retailer or by a retailer through a wholesaler, unless a schedule as approved by this section shall be filed by the wholesaler with the Supervisor of Liquor Control and as then in effect. The schedule shall be in writing, duly verified and filed and the number of copies and in such form as required by the Supervisor, and shall contain with respect to each item thereon the exact brand or trade name, capacity of package, nature of contents, age and proof, the per bottle and per case price to retailers, the number of bottles contained in each case, and the size thereof, which prices shall be individual for each item, and not in "combination" with any other item or items,

the discounts for quantity, if any, and the discounts for time of payment, if any.

Section 311.336. Schedules, filed when - other wholesalers may meet prices, how - sales at prices and schedule required - public inspection.

Each such schedule shall be filed on or before the 10th day of each month, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing hereof, and shall be in effect for and during such calendar month. Within ten days after the filing of such schedule, the Supervisor shall make all of such schedules or a composite thereof available for inspection by all wholesale licensees. Within three days, excluding Sundays, after such inspection is provided for, a wholesaler may amend his filed schedule for sales to a retailer, or purchase for a retailer, or by a retailer through a wholesaler, in order to meet lower competing prices and discounts for liquor or wine of the same brand and trade name and of like age and quality, filed pursuant to this section or Section 311.334 by any licensee selling such brands; provided, however, such amended prices may not be lower and discounts may not be greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof, and shall be in effect for and during such calendar month. No brand of liquor or wine shall be sold or purchased for a retailer by a wholesaler or by a retailer through a wholesaler except at the price or prices then in effect according to the wholesaler's filed schedule, and no discount shall be granted except as set forth in the schedule then in effect. All schedules filed shall be subject to public inspection from the time that they are required to be made available for inspection by licensees and shall not be in any manner

considered confidential. Each wholesaler shall retain on his licensed premises for inspection by licensees a copy of his filed schedule then in effect. The supervisor of liquor control may make such rules and regulations as shall be appropriate to carry out the purpose of this section and Section 311.332 and Section 311.334.

Section 311.338. Violation of wholesale price regulations, misdemeanor - suspension of license.

Any person violating any provisions of Sections 311.332 to 311.338, shall be deemed guilty of a misdemeanor, and it shall be the duty of the supervisor of liquor control to suspend for not less than fifteen days or revoke the license of any wholesaler violating any of the provisions of Sections 311.332 to 311.336.

Regulation No. 70-2.190, State of Missouri Division of Liquor Control, enacted pursuant to the aforementioned statutory provisions, is attached in its entirety in the Appendix in Appendix C.

APPENDIX F

Regulation No. 70-2.180

In Re: Ceded Areas—Licenses, Excise and Inspection Fees.

(1) **License not Required.**—Licenses are not required for the retail sale of intoxicating liquor and nonintoxicating beer for establishments located on lands within the State ceded to the Federal government for military purposes and upon which military installations exist.

(2) **Excise or Inspection Fees Not Required.**—No excise nor inspection fees will be imposed on any intoxicating liquor or nonintoxicating beer sold or offered for sale by establishments located on lands within the State ceded to the Federal government and upon which military installations exist.

Regulation No. 70-2.190

Unlawful Discrimination and Price Scheduling

(1) Mechanized Product Price Register.

(A) The Mechanized Product Price Register is a system designed to accept pricing information from wholesalers in a machine readable format at various set times of the month for varying processing cycles. Those transactions are processed into a master file of prices by brand and wholesaler number. Wholesaler transactions shall be submitted on either IBM eighty (80) column cards or a magnetic tape (nine ?????? 1600 bits per inch) which are acceptable to the IBM/370 Mod 145 computer system, or such computer system as the supervisor may order. A six (6) digit brand number for all liquors and wines from

the Universal Numeric Coding System for Alcoholic Beverages shall be used to identify all products posted in the Mechanized Product Price Register. Unique wholesaler numbers shall be assigned by the supervisor for individual identification in the Register. The Mechanized Product Price Register, or commonly known as, Master Price Schedule, of all brands of intoxicating liquor and wine containing alcohol in excess of five (5) per cent by weight shall be maintained by the supervisor. This master file shall contain the following information by wholesalers: six (6) digit brand number and check digit, brand name, vendor number, class and type, age, proof and/or per cent of alcoholic content by weight, bottle and case prices, discount code, wholesaler posting brand.

(B) The following reports from the Mechanized Product Price Register will be made available to all interested parties on a periodic basis.

1. Master Price Schedule. The Master Schedule provides a detail listing of all prices charged for all items sold by each wholesaler.

2. Cumulative Change Report. The Cumulative Change Report lists all changes to the master file from the last master schedule printing to the present.

3. Change Report. The Change Report lists all changes to master schedules during a given change cycle.

4. Amendments Report. The Amendments Report lists all amendments to master schedule items during a given amendment cycle.

5. Wholesaler Transaction and Freeze Report. This report lists all transactions, by wholesaler, for a given processing cycle and also lists by date for which prices are frozen for six (6) months.

6. Wholesaler/Vendor Report. This report lists by wholesaler, all vendors, and corresponding brands sold by all wholesalers or by certain selected wholesalers, along with pricing information for each item.

(2) Pricing rules to prohibit discrimination.

(A) Supplemental posting. When a new product is added by a wholesaler, a supplemental posting must be made to the supervisor. New product prices must meet the following criteria:

1. All wholesalers posting prices for a new brand must first be authorized for that brand by the supervisor. A wholesaler may post his prices for a new product at any time during the month, after all brand registration requirements have been met. The supervisor will then issue a letter of approval on which the wholesaler will be required to post the following information: full brand name, vendor name and number, brand number and check digit, class and type, age, proof and/or percent of alcoholic content by weight, bottle price, case price, bottles per case. After the letter is returned to the supervisor by the wholesaler with this information, it will be stamped APPROVED or DISAPPROVED and dated. Seven (1) days after this letter has been stamped APPROVED and dated by the supervisor, the product may be sold.

(2) Any new items in the state, including new products, new sizes or new proofs being posted on supplemental schedules may be posted at any time the wholesaler desires. This category of new items must be posted within the same calendar month. However, a new item on a supplemental schedule that has previously been posted by another wholesaler may not be posted at a price lower than the price currently established by schedules in effect.

(3) The price posted in the supplemental schedule shall remain in effect and shall not be subject to change before the first of the month when a regularly filed schedule shall become effective.

(B) Monthly price changes.

1. All wholesalers shall file their monthly price changes in machine readable form with the supervisor or in a form he designates on or before the tenth (10) calendar day of each month unless otherwise ordered by him. When the tenth (10) day of the month falls on a Sunday or legal holiday, such schedule shall be filed on the next regular business day. These price changes shall be coded to designate that they are changes to existing prices on the master file. In addition wholesalers may file prices for new products and new sizes which will be coded to designate that they are additions to the master file. Where an item has previously been posted by another wholesaler, a wholesaler may not post a price lower than the price currently established by schedules in effect.

2. All prices for products authorized by the supervisor for a wholesaler may be lowered by any amount. If the price is decreased by more than two (2) per cent of the prior established price, either for bottle or case price, the price shall be frozen for six (6) months as explained in subsection (2) (E) of this rule.

3. A product that was frozen in a prior processing period shall be refrozen if the price decreases by any amount.

4. Prices may be increased only for those products not frozen.

(C) Amendments.

1. Within three (3) days, excluding Sundays, and holidays, and on a date to be fixed by the supervisor when he makes available for inspection the Master Price Schedule or the Cumulative Change Report, a wholesaler may amend his filed Schedule for sales to a retailer, or purchase for a retailer or by a retailer through a wholesaler, in order to meet lower competing prices and discounts for intoxicating liquor or wine of the same brand, trade name, age and proof.

2. All price changes must be only downward. No price changes shall be made upward in amendment processing. Any transaction attempting to lower a price below the lowest scheduled price will be flagged as an error and will be totally rejected.

(D) Discounts.

1. The granting of any discount is optional with the seller, but when given must not exceed one (1) per centum for quantity of liquor and wine, and one (1) per centum for payment on or before a certain date.

2. Quantity discounts. A quantity discount may be granted only for quantities of two (2) or more. If a price is listed for bottles only, then a quantity discount may be allowed on quantities of two (2) or more bottles. If a price is listed for both bottles and cases, then a quantity discount may be allowed only on quantities of two (2) or more unbroken cases. Quantity discounts may be graduated but may not exceed the maximum one (1) per cent.

3. Discounts for Time of Payment. A discount for time of payment may be granted only for (1) payment for time of delivery, (2) payment on or before ten (10)

days from the date of delivery or, (3) payment on or before fifteen (15) days from the date of delivery. Only one such discount may be granted during any one month, except that a wholesaler may amend his schedule to meet competing discounts for time of payment.

4. The combination of discounts which shall be posted on the Mechanized Price Register are as follows: No discount, one per cent (1%) for time of payment, one per cent (1%) for quantity discounts, one per cent (1%) for time of payment and one per cent (1%) for quantity.

5. No person licensed to sell intoxicating liquor and wine at retail may accept any discount, rebate, free goods, allowances or other inducement from any wholesalers except the discount for payment and quantity discount on or before a certain date.

(E) Scheduling of prices less than ninety-eight per cent (98%) of prices scheduled for the prior month.

1. It shall be presumed (subject to rebuttal as hereinafter set forth) that any price scheduled by any licensed wholesaler which is less than ninety-eight per cent (98%) of the price scheduled by the same licensed wholesaler for the same brand, age, proof and size bottle of intoxicating liquor and wine containing alcohol in excess of five per cent (5%) by weight on the price schedule of said licensed wholesaler for the prior month represents an attempt by such wholesaler to give an indirect quantity discount in excess of one per cent (1%).

2. Such presumption may be rebutted by reasonable proof to the supervisor of liquor control before such price is scheduled that the price to be scheduled is a fair wholesale market price for the merchandise in question and is not set to give indirect quantity discounts in excess of

one per cent (1%), or by the written declaration of the licensed wholesaler that the merchandise in question will be sold at such reduced price for at least six (6) consecutive calendar months thereafter; provided a licensed wholesaler may schedule a higher price for the merchandise in question during such six (6) month period if he or it shall first submit reasonable proof to the supervisor of liquor control that the reduced price was a fair wholesale market price and was not set to give indirect quantity discounts in excess of one per cent (1%).

(F) Case size: For the purpose of this regulation a case of intoxicating liquor or a case of wine is declared to be a cardboard, wooden or other container, containing bottles of equal size filled with intoxicating liquor or wine or the same brand, age and proof. The following table depicts the number of bottles considered to be a case of various bottles sizes for both the English and Metric systems of measure, for price scheduling purposes:

Size of Bottle	Number of Bottles per Case
Less than 6.3 ounces	48, 60, 96, 120, 144, 192, or 240
8 ozs. up to but not including 10 ozs.	48
10 ozs. up to but not including 21 ozs.	24
21 ozs. up to but not including 43 ozs.	12
43 ozs. up to but not including 85 ozs.	6
85 ozs. up to and including 128 ozs.	3, 4, or 6

1. The Universal Coding of Alcoholic Beverages for Products by container size shall be used to code the bottle size. An "item" is hereby declared to be either a bottle or a case of intoxicating liquor or wine scheduled as hereby required.

2. All sizes less than one-half (½) pint or eight (8) ounces under the English System of Measure shall be defined as miniatures to be sold to airlines and railroads. Under the Metric System of Measure miniatures to be sold to airlines and railroads are defined as fifty (50) milliliters (1.7 ounces) for spirituous liquor and one hundred (100) milliliters (3.4 ounces) for vinous liquors. Case sizes for miniatures shall be 240, 192, 144, 120, 96, 60 and 48 bottles. Miniatures shall be sold in only one case size for each bottle size sold.

(G) The price to retailers, except retailers operating railroad cars, shall include, federal custom duties, Internal Revenue taxes, state excise tax, bottling and handling charges, and the cost of delivery to the retailer. The price to retailers operating railroad cars may be scheduled at a price "ex state excise tax," but shall include all other taxes and costs computed in prices to other retailers. No charge(s) shall be made in addition thereto, except that on past due accounts there may be imposed a finance (interest) charge in accord with that permitted by law. Provided, however, that if a wholesaler elects to impose such finance (interest) charge on past due account, such charge shall be of uniform rate to all retailers and shall be imposed on all retailers who have past due accounts.

(H) Delivery—Any brand of liquor or wine sold to a retailer must be shipped to and received by the retailer in the month for which the scheduled price set forth on the invoice is in effect. No wholesaler may take an order for delivery in a subsequent month, except that on and after the date on which amended schedules are filed, orders may be taken for delivery in the following month at the price in effect for that month. Such orders may not be shipped before the first day of the following month.

(I) Returns—No merchandise shall be accepted for return from a retailer except—pursuant to a court order, or with approval by the supervisor for good cause shown.

(J) Breakage, Samples, Expenses—As part of its regular books and records, each wholesaler licensed to sell intoxicating liquor or wine shall keep a monthly record of all allowances for breakage containing the name, address and license number of the customer, the amount of breakage allowance, the date and number of the invoice of sale, and the Federal strip stamp numbers of each broken bottle for which allowance is given. No allowance for breakage shall be given unless the broken bottle is returned to the seller within seventy-two (72) hours after delivery and where the container is required to have Federal strip stamp affixed thereto, such stamp must be intact at the time of return. Such broken bottles shall be kept available on the wholesalers licensed premises for inspection by representatives of the supervisor, and may not be removed from the licensed premises or destroyed without permission from the supervisor.

(K) Posting of Contraband Liquors and Wines Purchased from Supervisor—Bottles or cases of liquor or wine as described in subsection (2) (F) hereof which have been declared contraband and purchased by a wholesaler from the supervisor or the officer who seized the same under the provisions of section 311.820 and 311.840, RSMo (1978), or by a wholesaler from a wholesaler who so purchased the same, may be scheduled by such wholesaler at prices less than other liquors and wines of the same brand, age and proof. When such liquors and wines are so scheduled, the schedule shall be accompanied by a writing on which such liquors and wines are exactly described and the quantity or quantities thereof available for purchase set forth, and upon sale of all or any part

thereof a copy of the invoice shall be sent to the supervisor upon the day it is prepared. Only liquors and wines so purchased by a wholesaler may be sold at such posted prices.

(L) Discriminatory Agreements—

1. No person holding a license as a manufacturer-solicitor or outstate solicitor of spirituous liquor or wine shall enter into or participate in any combination or agreement with any person holding a license as a wholesaler or wholesale-solicitor for the sale of spirituous liquor or wine which restricts the customers to whom the wholesaler or wholesale-solicitor may sell merchandise which he owns.

2. No person holding a license as the wholesaler or wholesale-solicitor for the sale of spirituous liquor or wine shall enter into or participate in any combination or agreement with any person holding a license as a manufacturer-solicitor or outstate-solicitor of spirituous liquor or wine, which restricts the customers to whom the wholesaler or wholesale-solicitor may sell merchandise which he owns.

(M) Universal Numeric Codes on Invoices

1. The Universal Numeric Code for Alcoholic Beverages shall be used to code all liquors and Missouri's six digit wine code shall be used to code all wines on all invoices written by any manufacturer, vintner, solicitor and/or wholesaler licensed by the Division of Liquor Control of the State of Missouri; this shall not include invoices written by wholesalers to retail licensees. The brand number to be used concurrent with other descriptive data by Missouri licensed manufacturers, vintners, and solicitors is the six (6) digit number devel-

oped by the Distilled Spirits Council of the United States, Inc., and Missouri's six digit wine code. In addition, the descriptive data for liquors and wines shall include the age or vintage, proof or per cent of alcohol by weight, class and type and brand name. Missouri wholesalers shall include brand name, age and proof for spirituous liquors and vintage for wines on all invoices to retailers when the vintage creates a cost differential for the same type of wine. Any failure of any person, firm or corporation licensed under any provisions of chapters 311 and 312 RSMo (1978) and amendments thereto, to comply in all respects with the rules and regulations, and any violation by any such licensee of these rules and regulations shall be deemed to cause for the revocation or suspension of the license of the offending licensee.

APPENDIX G

FINOCCHIARO, INC. V. NEBRASKA LIQ. CONT. COMM. NO. 83-255 - filed June 1, 1984.

1. Constitutional Law: Statutes. The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.

2. .....: ..... Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. There must be some clear and real connection between the assumed purpose of the law and its actual provisions.

3. Constitutional Law. The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases and to sell it at such price as he can obtain in fair barter.

4. Constitutional Law: Statutes. If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

WHITE, J.

Plaintiff Louis Finocchiaro, Inc., a licensed wholesaler of wine and spirits, filed this action seeking injunctive relief against the enforcement of Neb. Rev. Stat. §§ 53-168, 53-168.03 (Cum. Supp. 1982), 53-168.01, 53-168.02, 53-168.04, and 53-168.05 (Reissue 1978), and a declaration that said statutes are invalid because (1) they constitute a restraint of trade in violation of § 1 of the Sherman Act (15 U.S.C. §§ 1 et seq. (1976)), and (2) the statutes violate Neb. Const. art. I, §§ 3 and 25. The trial court found that the statutory scheme did not violate either the Nebraska Constitution or the Sherman Act. Plaintiff appeals, and we reverse and remand with directions to enter a judgment in accordance with this opinion.

Sections 53-168.01 through 53-168.05 invoke a statutory scheme commonly known in the liquor industry as "post and hold" laws. These sections will be referred to as either post and hold laws or price-posting statutes. All manufacturers, distributors, and wholesalers initially starting business are required to file a schedule of prices under § 53-168.04.

After filing their initial price schedules, only wholesalers of wines and spirits remain subject to the post and hold laws. Pursuant to the statutory scheme, all Nebraska wholesalers are required to post their resale prices each month with the Nebraska Liquor Control Commission. All prices posted with the commission become public information and are thus available for the inspection of competing wholesalers as well as liquor retailers. Initial prices on new items being introduced to the market become effective immediately upon posting, and all prices filed

with the commission must remain in effect for a minimum of 30 days. In order to change the price of any item, the wholesaler is required to post a new price with the commission at least 35 days prior to the first of the month in which the changed price is to become effective. There is no limit on the number of monthly price increases that may be made.

Price reductions, however, are treated differently. Because a minimum of 150 days must elapse between the end of a price reduction period and the beginning of a subsequent price reduction period, the statutory scheme effectively limits wholesalers to two price reductions per item in any year. In addition, under § 53-168.03 wholesalers are prohibited from amending their price schedules to reflect quantity discounts, and under the provisions of § 53-168 wholesalers are prohibited from giving quantity discounts, and retailers are also prohibited from receiving quantity discounts.

As its first assignment of error, plaintiff contends that the price-posting statutes are unconstitutional under Neb. Const. art. I, §§ 3 and 25.

The aforementioned portions of our Bill of Rights provide: "No person shall be deprived of life, liberty, or property, without due process of law." Neb. Const. art. I, § 3. "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. . . ." Neb. Const. art. I, § 25.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. *State v. Geest*, 118 Neb. 562, 225

N.W. 709 (1929). Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. *United States Brewers' Assn., Inc. v. State,* 192 Neb. 328, 220 N.W.2d 544 (1974). Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. *Schaffer v. City of Omaha,* 197 Neb. 328, 248 N.W.2d 764 (1977). There must be some clear and real connection between the assumed purpose of the law and its actual provisions. *United States Brewers' Assn., Inc. v. State, supra.*

The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified titie to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State, ex rel. English v. Ruback,* 135 Neb. 335, 281 N.W. 607 (1938); *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.,* 175 Neb. 26, 120 N.W.2d 374 (1963); cf., *Gillette Dairy, Inc. v. Nebraska Dairy Products Board,* 192 Neb. 89, 219 N.W.2d 214 (1974); *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N.W.2d 227 (1960).

In the case of *Golden v. Bartholomew,* 140 Neb. 65, 72-73, 299 N.W. 356, 359-60 (1941), this court stated:

> "The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some regulation to the public health or public welfare, and whether such

> is, in fact, the end sought to be attained." . . . "In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general walfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof; and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised. * * * Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional. . . ."

If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. *Gillette Dairy, Inc. v. Nebraska Dairy Products Board, supra.* The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition. *Terry Carpenter, Inc. v. Nebraska Liquor Control Com., supra; Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (1939); *Lincoln Dairy Co. v. Finigan, supra.*

The question to be answered is whether there is "some clear and real connection" between the stated purposes of the law and its actual provisions. *United States Brewers' Assn., Inc. v. State, supra.*

The legislative declaration of purpose for the price-posting statutes is contained in § 53-168.01. The first purpose of the price-posting statute is to foster "temperance" in the consumption of alcoholic liquor and "respect for and obedience to the law." At oral argument counsel conceded that the price-posting act has not served its purpose in fostering temperance in the consumption of alcoholic beverages. In addition, evidence before the trial court indicates that consumption has increased dramatically since the price-posting law arguably has been in effect. While it cannot be gainsaid that all laws arguably foster "respect for and obedience to the law," such is not a clearly articulated reason which, on its strength alone, would allow a court to uphold the constitutionality of a questioned statute.

The next declared purpose of the act is to "promote an orderly marketing of alcoholic liquor." Assuming, arguendo, that the price-posting law actually promotes the orderly marketing of alcoholic liquor, the inquiry to be answered is whether it concomitantly promotes the public health, safety, or welfare. The state has not suggested and we cannot conceive of any reason that price-fixing promotes the public health, safety, or welfare, or, for that matter, orderly marketing of liquor.

The last declared relevant purpose of the price-posting statutes is to "implement section 53-168." Section 53-168 prohibits any discounts, rebates, and inducements of any kind by a wholesaler to a retailer. It further prohibits a wholesaler from giving and a retailer from receiving quantity discounts. Along the same line, § 53-168.03 also prohibits the amendment of price schedules to reflect quantity discounts. It is significant that the post and hold laws do not serve any purpose embodied in § 53-168 other than its prohibition of quantity discounts. The

statutory scheme is so intertwined that the post and hold laws would not be severable from the provisions affecting the prohibition of quantity discounts of § 53-168 under the test of severability set forth in *Nelsen v. Tilley, supra.* See, also, *State ex rel. Douglas v. Sporhase,* 213 Neb. 484, 329 N.W.2d 855 (1983). Because the Legislature has chosen to enact the provisions of § 53-168 together with the price-posting laws as a comprehensive and integrated statutory scheme designed to prohibit all quantity discounts, the statutes must, therefore, be construed and either stand or fall in unison under the provisions of the Constitution. Although the trial court's findings regarding § 53-168 are not specifically assigned as error, we shall consider the constitutionality of that section only insofar as it prohibits quantity discounts.

In *Central Markets West, Inc. v. State,* 186 Neb. 79, 180 N.W.2d 880 (1970), this court considered the constitutionality of the prohibitions of discounts affecting quantity purchases as contained in § 53-168. The court, in a 4-to-3 decision, upheld the constitutionality of the entirety of § 53-168, and said: "It would indeed be ironical if a legislative body with authority to completely do away with a certain type of business were found to be lacking in authority to promulgate reasonable regulations for its control." *Id.* at 85, 180 N.W.2d at 884.

In *Central Markets* the court took a new tack and departed from its long and carefully plotted course of protecting the property rights of the populace from unreasonable interference by their elected representatives. See, e.g., *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N.W.2d 227 (1960); *City of Scottsbluff v. Winters Creek Canal Co.,* 155 Neb. 723, 53 N.W.2d 543 (1952); *Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (1939); *Carolene Products Co. v. Banning,* 131 Neb. 429, 268

N.W. 313 (1936); *Golden v. Bartholomew,* 140 Neb. 65, 299 N.W. 356 (1941); *State v. Geest,* 118 Neb. 562, 225 N.W. 709 (1929); *Iler v. Ross,* 64 Neb. 710, 90 N.W. 869 (1902). We must not hesitate to reexamine the rationale of *Central Markets,* and determine whether it is equally convincing today.

In *Burns Baking Co. v. McKelvie,* 108 Neb. 674, 189 N.W. 383 (1922), we upheld the validity of a law which set both the maximum and minimum allowable weights of bread. The U.S. Supreme Court reversed, holding that the law was both unreasonable and unnecessary in that it prevented not only the fraud accompanying underweight loaves but it also prevented the benefit of overweight bread. The Court said: "[A] State may not, under the guise of protecting the public, arbitrarily interfere with private business . . . or impose unreasonable and unnecessary restrictions upon them." *Rev'd sub nom. Burns Baking Co. v. Bryan,* 264 U.S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813 (1924). The situation in *Burns* is analogous to the case at bar. If the state has no valid interest in preventing overweight bread—a benefit which would ultimately inure to the consuming public —can the state possess a valid interest in preventing discounts which are not intended to destroy competition? We think not. In both situations the Legislature has acted not to promote the public welfare but has, instead, imposed arbitrary regulations which impede the welfare of the populace. In this case the Legislature has thrown the protective economic cloak of the police power over the inefficient liquor retailers of this state "at the expense of the purchasing public." *Central Markets West, Inc. v. State,* 186 Neb. 276, 280, 182 N.W.2d 898, 900 (1971) (supp. op.; McCown, Spencer, and Boslaugh, JJ., dissenting).

"A statute designed for the private welfare of one class of licensed liquor retailers, which bears no real or substantial relationship to the general health, morals, or welfare of the public is unconstitutional. At best, it arbitrarily disregards the realities of fair competition in a free enterprise system." *Central Markets West, Inc. v. State, supra* at 88, 180 N.W.2d at 886 (McCown, Spencer, and Boslaugh, JJ., dissenting).

Since the statutory scheme invokes a blanket prohibition of all discounts, regardless of whether they are designed to destroy competition or merely an accommodation to a retailer purchasing a larger quantity with resultant savings to the consumer, the prohibition is not substantially related to the furtherance of the public welfare.

We hold that § 53-168, only insofar as it purports to prohibit wholesalers from giving and retailers from accepting quantity discounts, and the provisions of § 53-168.03, which prevent amendment of price schedules to reflect discounts, "[bear] no real or substantial relationship to the general health, morals, or welfare of the public," and are, therefore, unconstitutional and void. *Central Markets West, Inc. v. State, supra* at 280, 182 N.W.2d at 900. To the extent that *Central Markets* conflicts with this opinion, it is expressly overruled. The remainder of § 53-168, which does not relate to quantity discounts, is severable from the invalid portion. See *State ex rel. Douglas v. Sporhase,* 213 Neb. 484, 329 N.W.2d 855 (1983).

In *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963), this court considered the constitutionality of a rule promulgated by the commission. The rule, being almost identical to the post and hold laws currently in effect, required distributors to file their prices with the commission and make

all sales at those prices until changed upon application and with the consent of the commission, and limited the amount of permissible discounts. The rule was held to be promulgated without legislative authority. " 'This court has said that in the absence of appearance of public interest the Legislature may not itself impose prices. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507. May it constitutionally confer upon others a right which it does not itself possess?' " *Terry Carpenter, Inc. v. Nebraska Liquor Control Com., supra* at 39, 120 N.W.2d at 381.

> Rule 46 in the instant case is subject to the same objection heretofore mentioned. The manufacturer, distributor, or wholesaler is given complete and absolute power to fix prices in the first instance, without regard to reasonableness. Those prices so fixed are then wholly immunized from the forces of competition by the commission's rule. The rule precludes a retailer from the exercise of free bargaining with respect to the prices he will pay. And the rule even prevents the manufacturer, wholesaler, or distributor from revising prices from time to time in view of situations caused by competition, except by justifying the change on the basis of cost, experience that the price previously charged was insufficient or excessive, etc., supported by proper data. In essence, the buyer is precluded from having any voice in making contracts for the goods it is to buy.
>
> The conclusion must be reached that Rule 46 is a price-fixing rule pure and simple, and doubtless the purpose of the rule was to protect the little retailer from the volume dealer, in other words, to favor the small dealer over the volume seller by nullifying the natural competitive advantage of volume sales.

Id. at 39-40, 120 N.W.2d at 381-82.

In essence, the only real difference between Rule 46 and the post and hold laws is that the latter do not require one to prove the need for a discount, but, rather, limit any discounts to no more than two a year, separated by 150 days between the end of the preceding discount period and the start of a new discount period. Our opinion in *Terry Carpenter, Inc.*, foreshadows a result of today's decision. It can hardly be called a decisional denouement that we would reach the conclusion that the post and hold laws, §§ 53-168.01 through 53-168.05, are unconstitutional, since they bear no real or substantial relationship to the furtherance of the public health, safety, or welfare. Indeed, because the evidence shows a 70-percent increase in consumption of alcoholic beverages since the price-fixing laws were enacted, it is far too late to equate higher prices with reduced consumption and a concomitant promotion of the public health. Since plaintiff makes no complaint about § 53-168.01 as it relates to the regulation of advertising, we have determined that *only* that portion is severable under the test of *State ex rel. Douglas v. Sporhase, supra.*

While this decision may destroy large profits derived from the public in a state-implemented price-fixing scheme, it will also foster free competition among wine and spirits wholesalers in Nebraska, thereby affording the people a more efficient allocation of resources in this society.

The judgment of the trial court is reversed and the cause is remanded with directions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED
WITH DIRECTIONS.

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FILED
AUG 15 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-66

In the Supreme Court of the United States

October Term, 1984

WINE AND SPIRITS SPECIALTY, INC.,
A Missouri Corporation,
Appellant,

vs.

EDWARD D. DANIEL, Director, Department of Public Safety, JAMES A. FRANKLIN, JR., Supervisor, Division of Liquor Control,
Appellees,

and

MISSOURI WINE AND SPIRITS ASSOCIATION, INC.,
Appellee-Intervenor.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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Appellee-Intervenor.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

This appeal raises the question of whether Missouri's price posting statutes, §§ 311.332, 311.334, 311.336, and 311.338, RSMo 1978, and Department of Liquor Control Regulation 11 C.S.R. 70-2.190 (the price posting laws), are in conflict with the Sherman Act, 15 U.S.C. § 1 (1976), and are therefore unconstitutional under the Supremacy Clause of the United States Constitution.

The statutes are found within the Liquor Control laws of the State of Missouri which regulate the various phases of the liquor industry. Under these laws, the manufacturers, wholesalers, and retailers are characterized as separate phases of the liquor traffic, each requiring separate licenses from the State of Missouri. Within this framework, § 311.332 makes it unlawful for any wholesaler to discriminate between retailers or to grant, directly or indirectly, any discount for quantity and payment in excess of 1% apiece. As a means of furthering this anti-discrimination section, §§ 311.334 and 311.336 require the wholesalers to file a monthly schedule of their own prices which they intend to charge and the discount they intend to grant to retail sellers (retail licensees). The Supervisor of Liquor Control then makes this information available for inspection by all wholesalers. Within three days thereafter, each wholesaler may reduce (but not increase) prices to meet (but to go below) lower competing prices and discounts.

B. The Proceedings Below

The appellant, a licensed wholesale dealer in Missouri, filed a suit for declaratory judgment seeking to declare the Missouri "price posting laws" unconstitutional as conflicting with § 1 of the Sherman Act and therefore running afoul of the Supremacy Clause of the United States Constitution.

The Circuit Court on stipulated facts found in favor of the appellant and the appellees appealed. The Supreme Court of Missouri reversed the Circuit Court, holding there was no conflict between the state scheme and § 1 of the Sherman Act. The opinion is found at 666 S.W.2d 416 (Mo. banc 1984).

II.

ARGUMENT

The case presents no substantial question not previously decided by this Court.

The Missouri Supreme Court in analyzing whether the Missouri price posting statutes were unconstitutional under the Supremacy Clause of the United States Constitution relied on *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) and *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). The Missouri Supreme Court found, on stipulation of the parties, that price posting laws do not authorize or compel wholesalers tc agree among themselves for the purpose of contracting, combining, or conspiring to fix prices. *Wine and Spirits Specialty, Inc. v. Daniels*, 666 S.W.2d at 419. The Missouri Supreme Court found this did not create a conflict with the Sherman Act because the conduct contemplated by the statute was not in all cases a *per se* violation of § 1 of the Sherman

Act as required by *Rice v. Norman Williams Co.*, 458 U.S. at 659. The Missouri Supreme Court declined, on the record presented, to decide whether a conflict existed under a "rule of reason" analysis.

Under the facts stipulated by the parties, found by the Missouri Supreme Court, and binding on this Court, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68 (1963), the statute does not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases, or place irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. The statute does no more than disseminate price information among competitors. The dissemination of price information is, at most, a rule of reason violation. *United States v. Citizens and Southern National Bank*, 422 U.S. 86 (1975).

The Missouri scheme is almost identical to the price posting scheme approved by this Court in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). Because of this ruling and the criteria for preempting the state statutes set forth in *Rice v. Norman Williams*, 458 U.S. 654 (1982), this case presents no substantial federal question which would require full briefing and oral argument.

As recently as March 19, 1984, this Court dismissed an appeal from the Supreme Court of New Mexico raising similar issues. *United States Brewers Association v. The Director of the New Mexico Department of Alcoholic Beverage Control*, 668 P.2d 1093 (N.M. 1983), appeal dismissed, 104 S.Ct. 1581 (1984).

Appellant argues in his jurisdictional statement and question presented herein, as he did in the Missouri Supreme Court, that an anti-competitive effect of the statute alone is enough to hold the Missouri statutes unconstitutional. Although the stipulation by the parties was that the

statutes *may* have an anti-competitive effect, an anti-competitive effect alone is insufficient to create a conflict between the state statute and the federal antitrust laws. *New Motor Vehicle Board of California v. Warren W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

III.

CONCLUSION

Wherefore, appellees respectfully submit that the question upon which this case depends is so unsubstantial as to not need further argument, and appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

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